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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 429.

In the Matter

of

FOSTER CONSTRUCTION CORPORATION,
Bankrupt,

JOSEPH POPKIN,
Respondent,

D. GINSBERG & SONS, INC., (Creditor),
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

BRIEF FOR JOSEPH POPKIN, RESPONDENT, IN OPPOSITION.

LOUIS JERSAWIT,
Counsel for Respondent.

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On Petition for a Writ of Certiorari to the Circuit Court of Appeals, Second Circuit.

BRIEF FOR JOSEPH POPKIN, RESPONDENT, IN OPPOSITION.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported at 50 Fed. (2) 693.

Jurisdiction.

The order sought to be reviewed was entered July 1, 1931 (R. 78). The petition for certiorari was filed on October 1, 1931. The jurisdiction of this Court is invoked under Section 240, subdivision (a) of the Judicial Code (28 U. S. C. A. 347).

Question Presented.

Whether an order for the arrest of the President of a bankrupt corporation may be issued in bankruptcy proceedings to secure the attendance of such officer for the purpose of examining him on the petition of a single creditor of the bankrupt, not supported by two affidavits, made more than six months after the qualification of the trustee, the bankrupt's trustee not joining in the petition and without attempting to comply with Section 9 (b) of the Bankruptcy Act.

Statutes Involved.

The statutes involved are Sections 1-(4), 2-(15), 7-(a), 9-(b) and 21-(a) of the Bankruptcy Act of 1898, and Section 261 of the Judicial Code. They appear in full in the appendix hereto.

Statement.

The following are the essential facts as they appear from the record:

The Foster Construction Corporation was adjudicated a bankrupt prior to July 1, 1930, on which date a Trustee was appointed and qualified (R. 3, fol. 9). The respondent Popkin was the President of the bankrupt (R. 10, fol. 29). On December 4, 1930, the petitioner D. Ginsberg & Sons, Inc., obtained an ancillary order *ne exeat* and which also ordered the examination of the respondent Popkin before a Special Commissioner in Bankruptcy, by which the United States Marshal was directed to take said Popkin into custody, etc. (R. 7). Pursuant to that order, a warrant of arrest

was executed by the Marshal and the respondent was taken into custody (R. 15). Thereupon, said Popkin made an application to vacate the order of *ne exeat* (R. 1), which application was denied by the District Court (R. 64). The Circuit Court of Appeals, Second Circuit, granted leave to appeal from said order (R. 72), and upon the appeal the Circuit Court of Appeals, Second Circuit reversed the District Court and granted the motion to vacate the ancillary order of *ne exeat* (R. 78).

The opinion of the Circuit Court of Appeals appears at R. 73.

Argument.

The only authority urged by the petitioner in any of the Courts below, in support of the order of *ne exeat*, is claimed to have been found in Sec. 2, subdivision 15 of the Bankruptcy Act quoted in the appendix. The Circuit Court of Appeals, however, upheld all three contentions of the respondent, as follows:

1. No order or writ of *ne exeat* for the arrest and detention of witnesses can be issued under Sec. 2, subdivision 15 of the Bankruptcy Act, as they may be issued only when authorized by Sec. 9, subdivision b, of that Act, and in the manner there prescribed.

2. The Bankruptcy Court was without jurisdiction to issue an order or writ of *ne exeat* against an officer of the bankrupt corporation, himself not being the bankrupt.

3. No person other than the Trustee is authorized to petition the Court for an order or writ of *ne*

exeat, and, as the Trustee did not make or join in the petition in this case, no order or writ could issue.

It is submitted that this application presents no question of conflicts between decisions in the different Circuits, as the only prior decisions are in accord and do not conflict with that in this case, nor does it involve any important question of Federal law or a departure from the usual procedure of judicial proceedings. The decision below was against the petitioner on all of the three separate distinct grounds above stated, and, unless the Court below was wrong on *all three* points, its decision must necessarily stand, and it is submitted that it cannot be seriously argued that *all three* of these points involve any important question of general law which requires decision by this Court.

A Court of bankruptcy can issue an order or writ of *ne exeat* only in the manner and under the conditions prescribed by Sec. 9 (b) of the Bankruptcy Act.

The section referred to authorizes such a writ against the bankrupt, provided the petition therefor is supported by the affidavit of at least two persons and made within 30 days after the qualification of the trustee. Petitioner's contention is that despite this express grant there is a general authority to issue such a writ in any other case deemed necessary by the Court under the omnibus provision of Sec. 2, subdivision 15 quoted in the appendix.

It is submitted, however, that this cannot be the law, as otherwise there would be no necessity whatever for Sec. 9 (b). If there is power in the Court under Sec. 2, subdivision 15 to grant a writ *at any time* against *any person* on the unsupported affidavit of *a single creditor*

(which was the situation here), what necessity would there be for Sec. 9 (b), which authorizes the writ only against the bankrupt and only if applied for within 30 days after the qualification of the trustee and when supported by at least two affidavits? The greater would obviously include the lesser and there would be no necessity for expressly authorizing the lesser.

Similarly, Section 9 (b), authorizes the writ only against a person *who resides or has his principal office in the District.* Here no evidence of this condition precedent was presented; if petitioner's contention (that the writ may issue in cases other than those specified by 9 [b]) is correct, then the writ may issue against a person *casually* in the District, who has never resided nor had his principal place of business there.

This question is not a new or novel one. It has frequently been discussed and has been determined adversely to petitioner in at least two cases.

> *In re Hassenbusch,* 108 Fed. 35;
> *U. S. ex rel. Kelly* v. *Peters,* 166 Fed. 613.

And a similar denial of authority was asserted by Judge Choate in the matter of *In re Hale,* Fed. Cases 5911, which involved, however, the Act of 1867.

See also:

> *Collier on Bankruptcy,* 13th Ed., page 390;
> *Encyclopedia of Federal Procedure,* Sec. 3312;
> *Dick* v. *Swinton,* 1 Ves. & B., 371-373.

In no event is an order of arrest or writ of *ne exeat* authorized against an officer of the bankrupt corporation.

Section 9 (b) expressly authorizes the issuance of such an order only against the bankrupt. It is well set-

tled that an officer of the bankrupt is not the bankrupt within the meaning of such a provision.

Kaufman v. *U. S.*, 212 Fed. 613.

The limitations prescribed by this Section to the bankrupt itself is in line with the limitations on the general authority of the Federal Courts to issue such writs.

Thus, Sec. 261 of the Judicial Code, which authorizes the issuance of such writs in Civil suits, expressly provides that

> "No writ of *ne exeat* shall be granted *unless a suit in equity* is *commenced* and satisfactory proof is made to the Court or Judge granting the same that the *defendant* designs quickly to depart from the United States." (Italics ours.)

See also:

Davidson v. *Rosenberg*, 130 Wis. 24;
Longsdorf, Enc. Fed. Juris., Vol. 6, p. 970.

By the express language of this Section the authority to issue such writs is denied except in a suit in equity, and then only against *the defendant*. If the bankruptcy proceedings be deemed a suit in equity within the language of this Section, the authority of the Court would still be limited to issuing the writ against the defendant, that is, the bankrupt.

What the petitioner seeks here is judicial legislation. When the Circuit Court of Appeals held, in *Kaufman* v. *U. S.*, 212 Fed. 613, that an officer of the bankrupt is not the bankrupt within the meaning of Section 29 (b) of the Bankruptcy Act which provides for the punishment of bankrupts who conceal assets, Con-

gress corrected the omission by the Act of May 27, 1926, which expressly extended the crime to include such officer. The petitioner here is attempting to accomplish a like result by judicial decision.

There is ample other authority in the Federal Statutes by which an *officer* of a bankrupt corporation can be compelled to attend and testify. It appears in this case that the respondent was subpoenaed and failed to appear (R. 27-28). The remedy of the petitioner here was thereupon to cite him by contempt proceedings and a resort to the proceedings here attempted was not only unauthorized, but wholly unnecessary.

No person other than the trustee may petition for an order or writ of *ne exeat*.

Not only was the petition for the order or writ made by a single creditor, contrary to the provisions of Sec. 9 (b), but the Trustee did not join in the petition nor become a party thereto in any way.

During the administration of the bankrupt's estate, the creditors are represented by the Trustee who represents every creditor; if in a proper case the Trustee refuses to take action which he should take, the remedy for the creditor is to apply to the Court to compel the Trustee to take the action required, or to remove him, but not for an order authorizing the creditor to take such action *in his own name*.

This was pointed out by the Circuit Court of Appeals, Second Circuit, in the leading case of *In re Lewensohn*, 121 Fed. 538 (writ denied by this Court April 27, 1903).

See also:

Rogers Johnson Building Co., 30 Fed. (2) 359.

Conclusion.

The decision of the Court below to the effect that a creditor of a bankrupt corporation may not obtain an order or writ of *ne exeat* for the arrest of an officer of the bankrupt (not himself the bankrupt) made more than six months after the qualification of the trustee on the unsupported petition of a single creditor, in which the Trustee did not join and in which no attempt was made to comply with Sec. 9 (b), of the Bankruptcy Act, was undoubtedly correct. No question of general interest or importance is raised, and we submit that the petition should be denied.

Respectfully submitted,

LOUIS JERSAWIT,
Counsel for Respondent.

APPENDIX.

The Bankruptcy Act of 1898, as amended, (11 U. S. C. A.) provides in part as follows:

> "Sec. 1 (4) * * * 'bankrupt' shall include a person against whom an involuntary petition * * * has been filed or who has filed a voluntary petition, or who has been adjudged a bankrupt.
>
> Section 2. That the Courts of Bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the

United States Courts in the Indian Territory and the District of Alaska, are hereby made Courts of Bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Section 7, Subdivision a. The bankrupt shall * * * (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. * * *

Section 9, Subdivision b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy,

issue a warrant to the marshal directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Section 21, Subdivision a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. * * *"

Section 261 of the Judicial Code (28 U. S. C. A. 376) provides as follows:

"*Writs of ne exeat* may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any District Judge, in cases where they might be granted by the District Court of which he is a Judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the Court or Judge granting the same that the *defendant* designs quickly to depart from the United States." (Italics ours.)

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BRIEF FOR THE RESPONDENT.

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Attorney for Respondent.

THE COURT PRESS, INC.

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